No. 4481

United States Court of Appeals

FOR THE

NINTH CIRCUIT 2

FRANK C. BERTELMANN,

Appellant,

v.

MARY N. LUCAS, et al.,

Appellees.

Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF OF MARY N. LUCAS AND CHARLES LUCAS, APPELLEES.

ROBERTSON & CASTLE,
A. G. M. ROBERTSON,
Attorneys for Mary N. Lucas and Charles Lucas, Appellees.

Filed this.....day of....., 1925.

F. C. MONCKTON, Clerk,

By....., Deputy Clerk.

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STATEMENT OF THE CASE.

This case comes to this court upon the appeal of the petitioner below from a decree of the Supreme Court of Hawaii affirming the decree of the Circuit Judge of the Fifth Circuit, Territory of Hawaii, sitting in equity, sustaining demurrers to a bill in equity.

The averments of the bill have been summarized in the opinion of the Supreme Court (Record, pp. 135-143) and in the Appellant's brief.

The Respondents Mary N. Lucas and Charles Lucas demurred to the bill on the following grounds:

I.

That the Plaintiff has not in and by his said bill made or stated such a cause as entitles him to the relief prayed for or any relief in equity from or against this Respondent.

II.

That there is a misjoinder of parties Respondent in said bill in that Plaintiff has joined this Respondent in a cause or causes sought to be alleged against each and all the Respondents other than Charles Lucas in which this Respondent has no interest and as to which no relief is sought against this Respondent.

III.

That said bill is multifarious in that the same is exhibited against this Respondent and the several other Respondents therein named for entirely distinct matters and causes as to which or the greater part of which, as appears by the said bill, this Respondent is not in any manner interested or concerned, and ought not to be implicated, to wit: (a) the matters, things and causes averred or sought to be averred in Paragraphs IX, X, XI and XXII with

respect to the Respondents Janet M. Scott and Rubena F. Scott; (b) the matters, things and causes averred or sought to be averred in Paragraphs XVI, XVIII, XIX, XX and XXI with respect to the Respondents L. L. McCandless, Noa W. Aluli and John C. Lane; (c) the matters, things and causes averred or sought to be averred in Paragraph XXIII with respect to the Respondent Bishop Trust Company, Limited; (d) the matters, things and causes averred or sought to be averred in Paragraphs XVI and XXIV with respect to the Respondents Kilauea Sugar Company and Kilauea Sugar Plantation Compnay; and (e) the matters, things and causes averred or sought to be averred in Paragraph XXII with respect to the First National Bank of Hawaii at Honolulu.

IV

That said bill is also multifarious in that several separate and distinct causes or purported causes are therein sought to be averred against this Respondent, to wit: In Paragraphs I to IX inclusive, with respect to the Plaintiff's alleged claim of title in fee simple to an undivided eight-ninths interest in and to the lands described in Paragraph XXX; in Paragraph XIII with respect to the alleged invalidity of the deed of Arthur M. Brown, dated the 7th day of February, 1903; and in Paragraph XIV with respect to the mortgage executed by the Plaintiff on August 13, 1902.

IV-A

That Paragraph 26 of said bill is multifarious in that it seeks to have the title to the lands quieted, and an accounting for the rents, and also a partition; and furthermore, equity cannot entertain jurisdiction herein for the purpose of quieting the title because the plaintiff is not in possession, nor for an accounting because the bill shows that plaintiff knows the amount that has been paid and received as rent for the land and the account is not complicated or difficult to be tried at law, nor for partition because the bill shows that the legal title is in dispute and has not been adjudicated at law.

V

That it appears in and by Paragraph XXI of said bill that the controversy between said Plaintiff and this Respondent in regard to Plaintiff's claim of title in and to the land described in said bill is now pending and undetermined in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

VI

That it appears in and by said bill that in so far as the averments thereof relate to a controversy between said Plaintiff and this Respondent concerning the title to an eight-ninths interest in the lands referred to in said bill, that said claim of title arises under the will of Christian Bertelmann, deceased,

and this court has no jurisdiction to construe said will with respect to any title or claim of title arising under or depending upon the provisions thereof.

VII

That it appears in and by said bill that as to the matters, things and causes averred or sought to be averred in Paragraphs XIII and XIV the Plaintiff has been guilty of such laches and unreasonable delay in asserting rights, if any he had, with respect thereto as to bar him from the relief sought by the bill, and plaintiff is now barred by lapse of time in respect thereof.

VIII

That it appears in and by said bill that the Plaintiff has a plain, adequate and complete remedy at law in so far as the averments in said bill purport to set forth any cause of action against this Respondent with respect to claims to title to said lands arising under the will of said Christian Bertelmann, and as to such this Respondent is entitled to a trial by jury under the Seventh Amendment of the Constitution.

IX

That said bill is vague, uncertain and inconsistent in form and substance, and more particularly is Paragraph XIII inconsistent with Paragraph XVI in that the former purports to aver that neither this demurrant nor her husband, Charles Lucas, ever at any time took possession of the one-ninth interest in

said land which was originally devised to said plaintiff, whereas the averments of the latter paragraph, as well as other paragraphs of said bill, show that this demurrant and the heirs of said Catherine Scott, through their tenant the said Kilauea Sugar Plantation Company, are in possession of the entire land.

The Supreme Court of Hawaii failed to heed the admonition of the Supreme Court of the United States expressed in the case of Bierce v. Waterhouse, 219 U. S. 320, 332, where the court said, "The practice adopted by the Supreme Court of the Territory of passing without deciding other errors assigned upon a judgment is not approved, since it is likely to involve further review proceedings and duplicate appeals. Especially is this so in cases which are subject to the appellate jurisdiction of this court."

The court rested its decision upon only two grounds, namely, multifariousness and a remedy at law. While we have no doubt as to the correctness of the decision upon those grounds, we contend that the other grounds of demurrer should also have been sustained.

The federal equity rules, of course, do not apply here. The English chancery procedure still applies in Hawaii.

The main object of the bill, so far as the Lucas' and Scotts are concerned, is to obtain possession of the land described in the bill, and, so far as McCandless, Aluli and Lane are concerned, the ob-

ject is to have cancelled certain conveyances made to them by the complainant.

The bill shows upon its face that the claims of the Lucas' and Scotts, on the one hand, and McCandless and his associates, on the other hand, are antagonistic as between themselves as well as adverse to the complainant.

The bill seeks primary relief against three sets of defendants, (1) the Lucas', (2) the Scotts, and (3) McCandless, Aluli and Lane, and incidental relief against the Kilauea Sugar Plantation Co., Bishop Trust Co., and The First National Bank of Hawaii.

The relief sought against the Lucas' is (1) cancellation of the Sheriff's deed of February 7, 1903; (2) redemption of the mortgage made by petitioner on August 13, 1902; (3) to remove clouds on the ttile; (4) quieting the title; (5) an accounting for rents collected; (6) the partition of the land in the event that the court should find that the Petitioner as well as the Respondents have interests in the land, and (7) to obtain possession of the land.

In Paragraphs 1 to 8 and 12 of the bill the Petitioner sets forth facts and circumstances showing that there is a controversy between the Petitioner and the Lucas' as to the *legal* title to seven-ninths interest in the land in question which involves a construction of the will of the late Christian Bertelmann and the efficacy of certain tenders alleged to

have been made upon the Lucas' on October 30 and 31, 1916. (Par. 6.)

Paragraph 13 sets forth the execution and delivery of the Sheriff's deed of February 7, 1903; alleges that the deed is void and constitutes a cloud upon the title, that Mrs. Lucas is asserting title to the land under said deed; and Petitioner prays that it be cancelled.

Paragraph 14 alleges that the Petitioner mortgaged the one-ninth interest in said land which vested in him upon the death of his father to Mrs. Lucas on August 13, 1902; that the mortgage has been more than satisfied by the rentals which have been received by her; and that said mortgage, and other mortgages which Mrs. Lucas agreed to pay off, are clouds upon the title; and Petitioner prays that they be cancelled.

In Paragraph 26 the Petitioner says that if the Court should find that the estates which Mrs. Lucas acquired were not divested by the tenders, Petitioner owned and now owns an interest in said lands that he has never sold, and prays the court to determine what his interest is, and for an accounting for the rents, and for a partition of the land. Also, that if the court should find that the Petitioner is entitled to the whole estate he prays that the clouds be removed and that the whole title be quieted in him.

The Petitioner's case against the Respondents McCandless, Aluli and Lane is set forth in Paragraphs

17 to 20 inclusive. It will be observed that the case against those Respondents has no connection whatever with the case against the Lucas'. It relates solely and entirely to certain transactions between Petitioner and those Respondents with which the Lucas' had nothing whatever to do. The claim of the Lucas' arises under the will of Christian Bertelmann, whereas the claims of McCandless, Aluli and Lane arise under certain conveyances made to them by the Petitioner himself.

Paragraphs 9, 10 and 11 state the case against the Scotts which involves the *legal* title to one-ninth interest in the land in question.

Paragraphs 16 and 24 relate to the Petitioner's claim against the Kilauea Sugar Plantation Co.

Paragraph 22 seeks relief against the First National Bank of Hawaii in connection with the money alleged to have been tendered.

Paragraph 23 seeks relief against the Bishop Trust Co. in connection with rents said to have been collected.

Paragraph 21 shows that the controversy between the Petitioner and the Lucas' and Scotts as to the title to the land in question, including the right to possession and damages for the detention is pending in an action of ejectment in the Circuit Court.

The prayers contained in the bill are numerous and include cancellation of instruments, removal of clouds, quieting title, accounting, partition, a decree

"for the possession of the land," and a judgment "for the use or rents of said land."

The outstanding object of the bill, taken as a whole, is to get possession of lands which are now in the possession of the Lucas' and Scotts, together with damages for use and occupation, which, of course, is the usual and appropriate function of an action of ejectment.

ARGUMENT

We will now take up the several grounds of demurrer.

SECOND GROUND

Misjoinder of Parties Defendant

"A bill is multifarious which contains the demand of several matters of distinct and independent natures against several defendants who may be respectively liable, but not as connected with each other. *There must be some connection in interest among defendants against Plaintiff.*" 21 C. J. 422.

"The bill sets out independent causes of action in which the defendants have not a common interest. * * * The defendants Dwinell and Annable ought not to be subjected to the disadvantage and expense of meeting and answering charges of fraud against other persons with whom they have no connection."

Sanborn v. Dwinell, 135 Mass., 236, 237.

"The court is always averse to multiplicity of suits, but certainly a defendant has the right to insist that he is not bound to answer a bill containing several distinct matters relating to individuals with whom he has no connection."

Shields v. Thomas, 18 How., 253,
cited with approval in
Harrison v. Perea, 168 U. S., 311, 319.
"It is a fatal misjoinder in a bill to foreclose a mortgage to join a party claiming adversely to both mortgagor and mortgagee."
Dial v. Reynolds, 96 U. S., 340;
Crosscup v. German S. & L. Soc., 162 Fed., 947.
"There is a misjoinder in a bill brought against defendants acting upon different rights and who are not chargeable with any joint liability or interest in the relief sought."
Elk Brewing Co. v. Neubert, 62 Atl., 782, 783.
"A bill which subjects defendants who are entitled to defend separately to the embarrassments of a suit in which others are joined and there is no common interest is demurrable."
Miller v. Willett, 62 Atl., 178, 182.

We have already pointed out that the claim of the Lucas' arises under the will of Christian Bertelmann, whereas the claims of McCandless and his associates arise under certain conveyances made to them by the Petitioner himself. The Lucas' were not parties to the transaction between the Petitioner and McCandless and his associates. They had no connection therewith and are not interested therein. They object, and have a right to object, to being joined as parties to the controversy between Bertelmann and McCandless. This case, if it ever reaches a hearing, will presumably in the Fifth Circuit, and the Lucas' should not be put to the expense and inconvenience of attending court there while a controversy with which they have no concern is being threshed

out. As shown above, the courts hold that a defendant has the right to insist that he is not bound to answer a bill which contains matters relating to individuals with whom he has no connection; and that he ought not to be required to answer charges of fraud against other defendants with whom he has nothing in common. In the case at bar the Petitioner is seeking to quiet the title to the land in dispute as against the Lucas', and at the same time seeks relief for alleged fraud and failure of consideration against his former associates who are claiming adversely to both the petitioner and the Lucas'. It is analogous to the foreclosure cases above referred to, and the demurrer should be sustained upon the authority of those cases. As between the Lucas' and the other Respondents there is no "joint liability" nor a "common interest" or other "connection." This applies in principle, though to a lesser degree, as between the Lucas' and the Scotts. To be sure, the Scotts also claim title under the Bertelmann will but their one-ninth interest in the lands is separate and distinct from the eight-ninths claimed by Mrs. Lucas, and their respective titles depend on different considerations. The Scotts are not interested in any questions relating to the Sheriff's deed of 1903 or the mortgage of 1902, neither are they interested in the question whether the alleged tenders should have been made to Mrs. Lucas' grantors. On the other hand, the Lucas' are not interested in the question

whether upon the death of Catherine Scott the right of any of the testator's sons to acquire her one-ninth interest expired. In other words, there is no common interest or other connection between the Lucas' and the Scotts—their respective claims are wholly independent of each other and each depends on its own merits.

In connection with this ground of demurrer counsel for the appellant refer to the rule that only those defendants can demur for misjoinder of parties who are improperly joined. (Brief, p. 14). Under that rule the Lucas' have the right to demur on the ground of misjoinder because they have been improperly joined in a suit between the complainant and McCandless and his associates for the cancellation of certain instruments to which they were not parties and in which they have no interet. They are not "necessary" parties to that controversy nor are they "proper", "formal" or "nominal" parties thereto.

Counsel for the Appellant also refer to the elementary general rule that all persons having an interest in the subject matter of an equity suit should be made parties. (Brief, p. 13.) But that does not mean that a complainant may include in his bill two separate and distinct subject matters or controversies between antagonistic groups of individuals (as in this case) and then argue that both groups are properly joined because they are all interested in

one or the other of those subject matters or controversies.

Opposite counsel seem to assume that there is only one subject matter involved here, namely, the land which the complainant seeks to get possession of, and then they take it for granted that all persons who claim any interest in that land may be joined in one suit because they are all interested in that subject matter. That, we submit, is a mistaken view.

The subject matter of a suit is not the physical property whose ownership is disputed, but the controversy as to the title. It is "the nature of the cause of action and of the relief sought" (State v. Muench, 117 S. W., 25, 29), or "the right which one party claims against the other and demands judgment of the court upon." (Reed v. Muscatine, 73 N. W., 579.)

The nature of the causes of action, rights claimed, relief sought and judgment demanded by the complainant against the Lucas' and Scotts and against McCandless and his associates are obviously very different and hence it is clear that those two groups have been improperly joined in this suit and that any member of either group may raise the question of misjoinder.

The case of Pond v. Montgomery, 22 Haw. 241, and other similar cases which involved but a single subject matter, cited in the opposing brief, are not against us and do not sustain the contention of coun-

sel for the Appellant. The case of Scott v. Pilipo, 22 Haw., 252, cited on page 13 of their brief, holds that one who has collected rents from land involved in a partition suit is not a proper party to such suit, and is an authority in our favor.

In the case of Terminal Co. v. Hudnall, 283 Fed., 150, cited by the Appellant, the equitable jurisdiction was sustained on points not appearing in the case at bar, thus, the complainants were in possession, ten actions at law had been brought against them by the defendants, all the defendants based their claims on the same right, and a community of interest existed between them in the questions involved in the controversy. But here, the complainant is out of possession and, as shown by the bill itself, he has in conjunction with McCandless and his associates brought an action of ejectment against the Lucas' and Scotts to get possession, no actions have been brought against the Petitioner by any of the Respondents, and the matter of multiplicity of suits is not involved, and the Respondents in this case have no community of interest in the defense of the case, but, on the contrary, the interests of the two groups are in conflict.

The conflict of interest here referred to cannot be made clearer than by the statement that the Lucas' claim eight-ninths in the land, the Scotts one-ninth, McCandless four-ninths, and Aluli and Lane one-ninth each.

"A bill is multifarious which contains the demand of several matters of distinct and independent natures against several defendants who may be respectively liable, but not as connected with each other. *There must be some connection in interest among defendants against plaintiff.*"

21 C. J., 422;
Swift v. Eckford, 6 Paige, 22;
T. N. Motley Co. v. Detroit Steel Co., 130 Fed., 396;
Bank v. Starkey, 108 N. E. (Ill.), 695;
Carter v. Kimbrough, 84 So. (Miss.), 251.

The matter of misjoinder of parties defendant is closely connected with the subject of multifariousness which we will now discuss.

THIRD GROUND

Multifariousness

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting, in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he has no connection. In the former case, the defendant would be compelled to unite, in his answer and defence, different matters, wholly unconnected with each other; and thus the proofs, applicable to each, would be apt to be

confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed, courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."

Story, Eq. Pl. Sec., 271.

See also, 21 C. J., 408.

"A bill is multifarious which embraces distinct matters affecting distinct parties who have no common interest in the distinct matters."

Metcalf v. Cady, 8 Allen, 587, 589.

Tested by these definitions it requires no argument to show that the bill in this case is clearly multifarious. We have already pointed out wherein the claims alleged against the Respondents in this case are for separate and distinct matters; that the several Respondents and their respective defences are wholly unconnected and depend on separate proofs; and that it would be oppressive to the Lucas' to require them to answer the bill as it stands and thus be subjected to unnecessary delay and expense.

"It has been said that the application of the rule as to multifariousness is influenced very largely by the circumstances of cases as they present themselves and that it is impossible to lay down any universally applicable rule."

Hawn. Gov't v. Tramways Co., 7 Haw., 683;

Rumsey v. Life Ins. Co., 23 Haw., 142, 147.

That statement is undoubtedly correct. The great variety of circumstances under which the question may arise makes it possible to state only a general principle which shall be applied in a reasonable and common sense manner.

A few cases may be referred to by way of illustration.

"A bill is multifarious which is for partition among the true owners and settlement of their claim against a third party in possession without right."

Bullock v. Knox, 11 So., 339, 340.

"A bill against executors and beneficiaries under a will to have it declared invalid and against one claiming under an alleged deed of the testator is multifarious."

Miller v. Weston, 199 Fed., 104.

"To settle the ownership of corporate stock and to ask relief which depends on such ownership are two disconnected matters which will render a bill multifarious."

Inman v. N. Y. Water Co., 131 Fed., 997.

"A bill to establish complainants equitable title to certain land as against two defendants and to recover damages for breach of contract is multifarious *although all claims related to the same land.*"

Groom v. Wittmann, 164 Fed., 523.

See also,

Marshall v. Means, 56 Am. Dec., 444.

A bill is multifarious where, as in the case at bar, a *legal* demand against some of the defendants is joined with an *equitable* demand against other defendants.

Hudson v. Wood, 119 Fed., 764.

"A bill against separate trustees for an accounting and other relief is multifarious, although the trustees were appointed under the same will."

Carter v. Lane, 18 Haw., 10, 12.

See generally:

Bank v. Southern Seating Co., 92 S. E., 884;
Murrell v. Peterson, 49 So., 31, 34;
Stuck v. Alloy Co., 22 S. E., 592;
Roller v. Clark, 19 App. Cas. (D. C.), 539;
Cecil v. Karnes, 56 S. E., 885.

The multifariousness in this case is more pronounced in the joining of the Lucas' with McCandless and his associates and the First National Bank with whom, the bill clearly shows, the Lucas' have no connection or interest of any kind. Indeed, the claims of those two sets of defendants, as already pointed out, are antagonistic.

"A demurrer to a bill in equity, on the ground of multifariousness, goes to the whole bill, and if sustained, the bill will be dismissed."

Cecil v. Karnes, 56 S. E. (W. Va.), 885;
Muller v. Southern Seating Co., 92 S. E., 884;

We believe that none of the cases cited in Appellant's brief, go so far as to support the bill in this case.

In Castle v. Haneberg, 20 Haw., 123, it was held that a bill is not multifarious where *one general right* is claimed though the defendants may have distinct interests.

But in the case at bar there is not one general right claimed, but separate and unconnected rights are asserted against Lucas et al on one hand and against McCandless et al on the other. Furthermore, the right asserted by the Petitioner in the case cited was *equitable,* whereas in the case at bar the rights set up by Petitioner to at least eight-ninths of the land are *legal rights.*

Rumsey v. N. Y. Life Ins. Co., 23 Haw., 142, was a suit to recover the proceeds of an insurance policy on the life of plaintiff's husband, brought against the insurance company and Benson, Smith & Co., to whom the company had paid the money. The insured and the defendants were all parties to the transaction out of which the suit grew. The court said, (p. 147) :

> "there is an obvious connection between the alleged rights of the complainant against each of these respondents and their presence in the one suit is *necessary* to the determination of the whole controversy."

In that case there was only one controversy, whereas in this case there are three controversies. In that case both the defendants were necessarily joined, one because it had paid the money and the other because it had received it. In the case at bar the Lucas' are not necessary parties to the controversy between plaintiff and McCandless et al, nor are they proper parties thereto, because there is no connection between them.

But in the case at bar an *equitable* claim against McCandless et al has been joined with *legal* claims against the Lucas' and Scotts.

In Curran v. Campion, 85 Fed., 67, it was held that it is sufficient if each party has an interest in some material matters involved *which are connected* with the others.

But in the case at bar there is no connection whatever between the alleged claims against the Lucas' and McCandless et al. They are disconnected and adverse.

In Commonwealth Trust Co. v. Smith, 69 L. ed. U. S. 86, the bill was dismissed for non-joinder of necessary parties, but the reason, as pointed out by the court, was, that "The controversy is not peculiar to the contracts sued on, but reaches and affects all that are outstanding. The contracts, while several in form, are interdependent in substance and operation. * * * In a very substantial sense all the settlers are parties to one general contract * * * the interest of one cannot be defined and adjudged without affecting the interests of all others." Nothing said in that case can be construed to mean that an action to obtain possession of land against one person can be brought in a court of equity because the plaintiff has an equitable controversy against another person concerning the same land.

None of the cases cited are authority for the proposition that where, as in the case at bar, different defendants may be joined between whom there is no joint liability, common interest or other connection, and the relief sought against them is different in character.

The case of Commodores Terminal Co. v. Hudnall, 283 Fed., 150, is copiously quoted from in this connection. We have pointed out above wherein that case differs from this on the facts. The statement made in that case (p. 176) and other cases to the effect that "Multifariousness, therefore, presents a question of convenience, and its application in each case will be governed by practical and not by theoretical considerations," seems to us to be a glittering generality. There are many well considered cases in the books, some of which are cited in this brief, where bills have been dismissed for multifariousness where it would have been more convenient for the complainant to have tried all the questions in one suit. We believe no case has been cited in appellant's brief which holds that on the ground of "convenience" a claim of legal title to land against one defendant can be brought into a court of equity merely because the complainant has an equitable claim against another defendant even though it relates to the same land. The case cited by opposing counsel holds that the matter of convenience is "to be determined in the discretion of the trial court." In the case at bar the

trial court has decided that it would not be convenient to try the different issues set up in the bill in one case.

In 10 R. C. L. 430 it is said among other things, "If the object of the suit *be single,* but it happens that different persons have separate interests in distinct questions that arise out of that *single object,* such persons should be brought before the court in order that the suit may conclude the whole object." But, as stated on Page 433, "A bill will be considered multifarious if the distinct and separate claims made in it are so different in character that the court ought not to permit them to be litigated in one suit." We have pointed out wherein the claims asserted by the petitioner against the two groups of respondents differ in both origin and character.

Counsel for Appellant seem to contend that this bill may be maintained in equity in order to prevent a multiplicity of actions. Pomeroy's Equity Jurisprudence, Sections 243 to 276, is cited. In Section 245 of that work the author defines four classes of cases in which equity will take jurisdiction to prevent a multiplicity of suits. The case at bar would fall, if at all, under the fourth class. In Section 274 Mr. Pomeroy sums up the circumstances under which equity will exercise jurisdiction over the fourth class of cases, and it will be seen that in all of them the defendants must compose a numerous body of persons such as a large number of persons claiming

rights in a fishery, taxpayers, stockholders in a corporation and such like. But in Section 268 it is pointed out that in an ordinary bill of peace, or a suit to quiet title, in order to join a number of defendants there must be between them a "common right," a "community of interest in the subject-matter," or a "common title," and that it is not enough that there is a "community of interest in the question of law or of fact involved, or in the kind and form of remedy demanded."

> "The statement made by the author in Section 269 to the effect that equity will entertain jurisdiction in certain cases where there is no common title or community of right or of interest in the subject-matter has been severely criticized and its incorrectness pointed out."
>
> Tribette v. Ry. Co., 12 So. (Miss.), 32;
>
> Kansas, Etc., R. Co. vs. Quigley, 181 Fed., 190, 196.

In the case at bar, as between the Lucas' and McCandless et al, there is not only no common right or title or community of interest in the subject-matter, but there is no community of interest in the questions involved or in the kind or form of remedy asked.

In 21 Corpus Juris, 73, it is stated that

> "Equity will not take jurisdiction on this ground where there is no necessity for it, as where the legal rules as to joinder of parties and joinder or consolidation of actions permit adequate relief in a single action at law, or where

> for any other reason there is no necessity for a multiplicity of suits to obtain full relief at law, or where a multiplicity of suits would not be avoided. *So a multifarious bill will not be sustained on the ground of preventing a multiplicity of suits.*"

Applying what is there said to the case at bar it appears clearly that this suit cannot be maintained upon the ground sought. So far as the claim of legal title to nine-ninths of the lands devised by the Bertelmann will are concerned it can be made the subject-matter of an action to quiet title at law wherein the defendants will be given their constitutional right to a trial by jury. If the Petitioner feels that his claim against McCandless et al calls for equitable relief he can bring his suit in equity against them, but he cannot bring the Lucas' into that suit on the plea of preventing a multiplicity of suits. There is no "necessity" for joining them in the same suit, for upon the the trial of such a suit the issues between the Petitioner and McCandless et al and those between the Petitioner and the Lucas' would have to be tried just as separately as they would if they were made in separate suits, because the nature of those issues and the evidence concerning them would be entirely distinct and unconnected.

> "A bill in equity is not maintainable for the alleged purpose of avoiding a multiplicity of suits on the plea of saving expense and promoting the plaintiff's convenience *where the effect*

would be to deprive the defendants of a right to a trial by jury."

Boonville Bank v. Blakey, 76 N. E., 529, 536.

Yee Hop v. Young Sak Cho, 27 Haw., 308, 321.

"A party appealing to equity to avoid a multiplicity of suits must steer clear of the vice of multifariousness."

Peniston v. Brick Co., 138 S. W., 532, 535;

Fulton v. Fisher, 143 S. W., 438, 443.

"Plaintiff cannot escape into equity jurisdiction when relatively unsubstantial rights to equitable relief are balanced against the substantial rights of defendants to have the plaintiff's liability to them determined in law, each in his own action."

Empire Eng. Corp. v. Mack, III. N. E., 475, 478.

A suit in equity to obtain possession of land, sought to be maintained on the ground of preventing a multiplicity of suits, will be dismissed where, as here, the defendants can be joined in one action at law. The defendants in such case are entitled to a trial by jury under the Seventh Amendment.

McGuire v. Pensacola Co., 105 Fed., 677.

See generally:

Hale v. Allison, 188 U. S., 56, 6, 71;

Fidelity Trust Co. v. Archer, 179 Fed., 32, 36;

Buchanan Co. v. Adkins, 175 Fed., 692, 701.

Neither can the Petitioner get his case before an equity court on the theory that equity will take jurisdiction of the whole case and administer all the relief, legal or equitable, to which the parties are entitled.

It is only where the legal relief is merely incidental to some established equitable right that equity

will administer the legal relief. On this subject it is stated in 21 Corpus Juris, 140, that

> "The cause must be one presenting matters for equitable cognizance in the first instance which must be both alleged and proved, and the legal matters adjudicated must be germane to, or grow out of, the matter of equitable jurisdiction, and not be distinct legal rights not affected by the adjudication of the equitable questions involved. *The rule does not extend to cases where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a distinct and appropriate legal remedy of its own.*"

In the case at bar the Petitioner claims relief against McCandless et al on the ground of fraud and prays that a conveyance made by him to them be cancelled. Then he attempts to bring into that suit in equity legal claims to land against the Lucas' and Scotts and to have them adjudicated notwithstanding that as to them he has an adequate remedy at law, and they are entitled to a trial by jury. It cannot be done as shown by the above quotation from the latest treatise on the subject.

FOURTH GROUND

Multifariousness

We contend that the bill is multifarious also in that it embraces disconnected and independent claims against the Lucas'.

In Paragraphs 1 to 8 and 12 of the bill a claim of legal title to seven-ninths of the land in controversy

is set up and in Paragraphs 13 and 14 a claim of what counsel for the Appellant consider an equitable title to one-ninth is made, and the object is to have the title to the eight-ninths quieted in the Petitioner against the Respondents. In Paragraphs 4 and 12 the Petitioner avers that he is the owner "in fee simple absolute of all estates in and to all said lands and all parts thereof." And in Paragraph 26 the Petitioner seems to think that he and the Respondents Lucas and Scott may be tenants in common, and if so, asks for a partition of the lands.

All this confusion of ideas would tend to embarrass the court in the consideration and determination of the case with reference to the Lucas' and Scotts, not to mention the various claims against the other defendants.

> "Where a complainant alleges want of title, and (admitting title) non-performance, the bill is such as to embarrass the court in administering justice, and is demurrable for multifariousness."
>
> Haw. Govt v. Tramways Co., 7 Haw., 683, 689.
>
> "The bill may be framed with a double aspect, and ask relief in the alternative, but the state of facts on which such relief is prayed must not be inconsistent. The bill must not be multifarious; that is, two distinct grounds of equitable relief, even between the same parties, are not to be joined in one bill."
>
> Guano Co. v. Heatherly, 18 S. E., 611;
> quoted with approval in
>
> Day v. National, Etc., Assn., 44 S. E., 779.

The case at bar is somewhat like the case of The Cherokee Nation v. The Southern Kansas Railway Co., 135 U. S., 41, where the plaintiff sought an injunction to restrain the defendant from locating and maintaining its lines through its territory and prayed that if the injunction should be refused it might be awarded compensation for the lands proposed to be taken, and the court held that the bill was demurrable.

This case also comes within the rule applied in Hurt v. Hollingsworth, 100 U. S., 100, against joining legal and equitable claims in a bill in equity.

The test laid down in Brown v. Guarantee T. & S. Deposit Co., 128 U. S., 403, is a simple one. The court there said:

> "To support the objection of multifariousness, because the bill contains different causes of suit against the same person, two things must concur: first, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill."

This means, of course, that both grounds must be of an equitable nature, and the rule is that such grounds cannot be joined in one bill, if each is different and of itself constitutes a complete suit in equity. But where, as here, a legal claim to seven-ninths of the land is joined with a supposed equitable claim to a one-ninth interest the multifariousness is doubly clear.

GROUND 4-A

Multifariousness

This ground of demurrer is directed against Paragraph 26 of the bill which seeks to remove clouds, to quiet the title, an accounting for rents, and a partition.

There are a number of objections to that paragraph of the bill.

In Tagert v. Fletcher, 83 N. E. (Ill.), 805, it was held that a bill seeking to contest a will, praying partition, specific performance of a contract, and an accounting was multifarious.

In the first place, in order to quiet title to land in equity the plaintiff must be in possession for otherwise he would have an adequate remedy at law by an action to quiet title under the statute (R. L. Hawaii, 1915, Chap. 153) or by an action of ejectment.

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff."
>
> Frost v. Spitley, 121 U. S., 552;
>
> U. S. Mining Co. v. Lawson, 115 Fed., 1005.
>
> "It is also objected that, as a bill of peace, or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in

possession, an action of ejectment would lie."
Boston, Etc., Co. v. Montana, Etc., Co., 188 U. S., 632, 641.

The rule pertains in Hawaii.

Kapuakela v. Iaea, 9 Haw., 555;
Charman v. Charman, 17 Haw., 171.

The titles claimed by the parties to this suit under the will of Christian Bertelmann are legal titles. The Petitioner claims legal title under that will. The bill shows that the Lucas' and the Scotts are in possession of the land and that the plaintiff is out of possession. His remedy, if any, is therefore at law and not in equity.

In the next place, equity has no jurisdiction over an accounting where the account is not complicated.

Equity has jurisdiction "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." R. L. Hawaii, 1915, Sec. 2473.

"Equity has concurrent jurisdiction with law in matters of account where from their complexity and length courts of law are incompetent to examine them with the necessary accuracy. But the accounts do not appear to me to be complicated."
Haw. Gov't v. Brown, 6 Haw., 750, 752.
"If no discovery is sought, and no fiduciary relation exists between the parties, equity has no jurisdiction of an action for an accounting unless the accounts are mutual or complicated."
1 Corp. Jur., 618.

The amount of rents for which the accounting is asked is known to the Petitioner and it is easily calculated. The Petitioner says in Paragraph 14 of the bill that the Lucas' have received $8,000.00 per annum less 1/9 paid to the Scotts. The bookkeeper who would testify in a court of equity could give the same testimony before a jury. It is merely a matter of arithmetic.

Thirdly, equity will not entertain a bill for partition of land where the legal title is in dispute.

> "Upon well-accepted principles a plaintiff cannot maintain a bill for partition unless he shows title in himself, and such a title as will establish his right, as against the defendant, to a partition. Where the plaintiff's legal title is disputed, the court of equity declines jurisdiction to try the question, but, in analogy to the case of dower, will retain the bill for a reasonable time, until an action has been brought and the issue of title determined at law."
>
> Gilbert v. Hopkins, 171 Fed., 704, 708.
> quoting Street's Federal Equity Practice.
>
> "A bill for partition cannot be made the means of trying a disputed title."
>
> Bolton v. Bolton, L. R. 7 Eq., 298;
> quoted with approval in
> Clark v. Roller, 199 U. S., 541, 545.
>
> "The title of tenants in common must be conceded and at rest between them, or the court has no jurisdiction to partition the estate."
>
> Wailehua v. Lio, 5 Haw., 519;
> quoted with approval in
> Brown v. Davis, 21 Haw., 327, 329.

In the case at bar we find that the Petitioner in his bill claims the title to all the lands described in Paragraph 30, and in Paragraph 26 he says that if he owns less than the whole he wants the lands partitioned. The bill also shows that the Petitioner's claim of title is disputed by the Lucas', the Scotts and McCandless and his associates, it also shows that his claim of title is disputed by the Kilauea Sugar Plantation Co. Under these circumstances there can be no partition in equity before a cotenancy and the respective interests have been established in an action at law.

If counsel for Petitioner mean to contend that Petitioner could not obtain the relief sought by this bill in an action at law against both the Lucas-Scott group and the McCandless group, we agree with them. The obvious reason is that the relief sought against McCandless and his associates involves a separate controversy, in which the other Respondents are not implicated, and is of a purely equitable nature. But that furnishes no reason for bringing the dispute between Petitioner and the other Respondents into equity to litigate the legal title to the lands. A person who has a legal controversy with certain persons and an equitable one with others cannot expect to have both tried and determined in one suit. The complainant in this case is by no means the only litigant who has found himself in that situation.

FIFTH GROUND

Action pending at Law

"If the declaration, bill or complaint shows on its face that a prior suit is pending between the same parties, the objection in abatement may be taken, both at law and in equity, by demurrer."

1 Corp. Jur., 102.

"The pendency of a prior action may, in equity, usually be pleaded in bar. In this case, as it is alleged in the bill, the court will take notice of it, on demurrer, or on motion; but the effect is not the same as in an action at law. The court will inquire into the matter; and if it appears that the bill embraces the whole subject-matter in dispute more completely than the prior action, they will order the prior action to be discontinued, with costs to the defendant."

Sears v. Carrier, 4 Allen, 339, 341.

"A court of law will not permit a defendant to be vexed at the same time, in the same jurisdiction by the prosecution of two suits for the same cause of action by the same plaintiff. A court of equity will not permit this to be done; but instead of dismissing the second suit, it usually permits the plaintiff to elect which suit he will proceed with, and when the plaintiff has brought an action at law and afterwards a suit in equity, if the plaintiff elects to discontinue the action at law, he usually is permitted to prosecute the suit in equity."

Sanford v. Wright, 164 Mass., 85, 87;

see also:

Spear v. Cogan, 111 N. E. (Mass.), 793;

Laporte v. Scott, 76 N. E. (Ind.), 878.

Paragraph 21 of the bill shows that on January 10, 1918, the Petitioner, together with McCandless, Aluli and Lane, instituted an action of ejectment against the Lucas', the Scotts, Kilauea Sugar Plantation Co., and Bishop Trust Co. to recover the lands in controversy herein, and that the same is now pending in the Circuit Court of the First Circuit.

In that action, of course, the Plaintiff could recover mesne profits in case he should obtain judgment. In other words, leaving aside the relief sought against McCandless and his associates, with which the Lucas' and Scotts have nothing to do, the object of this bill is to secure possession of the lands with damages for their detention. The exact recovery can be obtained completely and adequately in the ejectment action.

The fact that McCandless et al are co-plaintiffs with Bertelmann in the ejectment case makes no difference. So far as Bertelmann is concerned he can discontinue the ejectment case whenever he wants. The cases above cited show that he should have elected which remedy he would pursue. He cannot vex these Respondents with two actions at the same time. If he preferred to prosecute the action of ejectment he could move it on for trial. If he wishes to proceed in equity he should have discontinued the action of ejectment.

It is not an uncommon thing for the defendant in an action at law who has a defense which is not

available in that action to assert his right in a suit in equity and have an injunction against the Plaintiff in the legal action. But that is not the case here. In the case at bar the complainant asks for an injunction against an action at law which he himself began and which he can discontinue (so far as he is concerned) at any time. Counsel say that petitioner cannot discontinue the action at law. Perhaps he cannot dismiss as to his co-plaintiffs, but there is nothing to prevent him from clearing his own skirts by withdrawing himself. His co-plaintiffs cannot prevent that.

The complainant here is trying to vex the defendants (other than McCandless et al) with two suits at the same time concerning the same property. That, the authorities will not permit to be done. Having elected, by not discontinuing the action at law, to retain that action, this bill should be dismissed.

No authority has been cited, and we believe none can be, to the effect that the plaintiff in an action at law can go into equity and ask that his legal action be restrained.

SIXTH GROUND

Construction of will in equity

Paragraph 2 of the bill sets forth three paragraphs of the will of Christian Bertelmann. That will is the foundation of the titles to the lands in

question claimed by the parties to this suit. Upon the proper construction of that will turn at least three questions involved in this case, viz: (1) whether, the plaintiff, having lost his original one-ninth interest by the Sheriff's sale in 1903, had the right to acquire the interests of his brothers and sisters by performing the condition as to payment in 1916; (2) whether, if he had not lost the right, the tender should have been made to the brothers and sisters, and not to Mrs. Lucas; and (3) whether, upon the death of Mrs. Scott, the right to acquire her one-ninth lapsed. In this case the claims of the respective parties, at least so far as eight-ninths of the land are concerned, and, we believe, as to the whole nine-ninths, are of strictly legal titles. This being so the claims must be litigated in a court of law.

> "A court of equity has no jurisdiction to construe a will where, as here, no trust is involved and the claims of the parties are of strictly legal interests in land."
> Paiko v. Boeynaems, 21 Haw., 196, 200.
> also, Estate of Kaiena, 24 Haw., 148.

Counsel say, on page 66 of their brief, "Certainly this Court would not go so far as to say, in a case like this where equitable rights are involved, where the will has already been construed in most particulars, that it would not consider the will as a whole, and add to the construction already made by the

courts should it be necessary to do so in order to give complete relief."

Counsel say, on page 67 of their brief "If Petitioner's theory of his case is correct, Lucas and the Scotts were holding the lands as trustees for his benefit, or as trustees whose trust would determine should he comply with the conditions of the will."

If the alleged tenders to Mrs. Lucas and the Scotts were properly made and thereby the petitioner acquired equiable interests in the land, we concede that a bill to compel conveyances would be in order and that in that case a court of equity could incidentally construe the will in deciding whether the petitioner was a "short-coming" son. But McCandless and his associates would not be proper parties to such a suit since their claims are adverse and disconnected. On the other hand the pending action of ejectment was evidently brought on the theory that the alleged tenders vested the legal title in the Petitioner. If that is correct the Petitioner's remedy is at law and not in equity. We deny, however, that the daughters were trustees for a performing son, and contend that the titles given to the children of the testator were legal titles.

The phrase "to give complete relief" so often used in the brief for the Appellant has a nice convenient sound but we believe that no court has carried the idea to the extent of sustaining a bill like the one at bar. The "equitable rights" which are involved

here are those claimed by the Petitioner against McCandless and his associates, and the fact that the Petitioner claims certain equitable relief against them does not give the court jurisdiction to construe the Bertelmann will in connection with the claim of the legal right to the possession of the land as against the Lucas' and Scotts.

It is true that the will was construed in certain respects in the cases of Bertelmann v. Kahilina, 14 Haw., 378, and Scott v. Lucas, 23 Haw., 338; 239 Fed., 450, which were submissions upon agreed facts, and did not involve the point here discussed, but the questions whether the Petitioner is a "short-coming son," and whether as to the Lucas' the alleged tender was properly made, and whether as to the Scotts the right to make any tender had lapsed, were not decided in those cases. Those questions relate solely to the *legal* claims of title asserted in the bill against the Lucas' and Scotts and have nothing whatever to do with the *equitable* claims asserted against McCandless et al. In short, the rule that "equity has no jurisdiction to construe a will where no trust is involved and the claims of the parties are of strictly legal interests in land" directly applies to the case at bar.

On page 79 of their brief, counsel for the Appellant point out a distinction between an estate upon condition and a conditional limitation. Mrs. Lucas, as the grantee of the several daughters of the tes-

tator took whatever the daughters had to convey. It seems to us that the estates of the daughters were conditional limitations. But if they were estates upon condition, then, upon the law cited in the Appellant's brief, the Petitioner should have made an entry in order to defeat them. No entry is alleged in the bill.

SEVENTH GROUND

Laches

Paragraph 14 of the bill shows that on August 13, 1902, the Petitioner mortgaged to Mrs. Lucas all his right, title and interest in and to the lands in question (which was one-ninth) to secure the payment of $9845 in three years with interest at the rate of ten per cent per annum, and alleges that the mortgage has been more than satisfied by the moneys (i. e., rents) collected by Mrs. Lucas, also that the Petitioner "has never parted with the one-ninth interest in said land which vested in him upon the death of his father." Paragraph 13 of the bill, however, shows that on February 7, 1903, the High Sheriff sold to satisfy a judgment all the Petitioner's interest in the lands in controversy "describing the same as a one-third interest." As Bertelmann owned only a one-ninth interest the deed was good, of course, only to convey what he did own. It is averred that the deed was void because the Petitioner was absent from the Territory and had no notice, and because the consideration paid was grossly in-

adequate, but that Mrs. Lucas is asserting title under it. It is alleged that the mortgage and deed are clouds upon the title claimed by the Petitioner and he prays that they be cancelled.

We contend that the Petitioner is barred by his laches with reference to the deed and mortgage.

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done."
> 21 Corp. Jur., 210.
> "It is an inherent doctrine of equity jurisprudence that nothing less than conscience, good faith and *reasonable diligence* can call courts of equity into activity and that they will not grant aid to a litigant who has negligently slept on his rights and suffered his demand to become stale where injustice would be done by granting the relief asked. It is therefore a general rule that laches or staleness of demand constitutes a defense to the enforcement of the right or demand so neglected."
> 21 Corp. Jur., 212.
> "In some cases long lapse of time has been held sufficient of itself to prevent relief. But mere delay in asserting a right does not ipso facto bar its enforcement in equity by the great weight of authority, unless the case is barred by the statute of limitations."
> 21 Corp. Jur., 221.
> "While statutes of limitations as enacted in some states apply by force of their own terms as well to suits for equitable relief as to actions at law, yet as ordinarily enacted they do not in terms apply to suits in equity; and accordingly,

where the right sought to be enforced in such a suit is purely equitable in character, and there is no corresponding legal right or remedy, there is nothing to which the statute can apply, by analogy or otherwise, and therefore it does not govern. But where there is a corresponding legal right or remedy, although equity may have exclusive jurisdiction over the enforcement of the right, courts of equity will apply the statute by analogy."

21 Corp. Jur., 251.

As to the Sheriff's deed. If, as alleged in Paragraph 13 of the bill, that deed was "void," it passed no title, does not constitute a cloud on the title, and does not affect anyone's rights in the premises. If that deed was merely voidable and can be cancelled only by a court of equity, then the Petitioner's right to have it set aside accrued the moment the deed was delivered, namely, on February 7, 1903—over nineteen years ago. But no court, either of law or of equity, will permit a party to sleep on his rights for any such length of time. The period of limitation for asserting legal rights to land (ten years in Hawaii) will be applied in equity unless under special circumstances the right may be barred by the lapse of a shorter period.

"The analogy of the statute of limitations applicable to the corresponding legal remedy is generally followed in fixing the time in excess of which delay will not be excused."

9 Corp. Jur., 1204.

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

Grymes v. Sanders, 93 U. S., 55, 62.

"In cases of concurrent jurisdiction, the federal courts, sitting in equity, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this is rather in obedience to the statute of limitations than by analogy. In many other cases they act upon the analogy to the statute, and they will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

Rugan v. Sabin, 53 Fed., 415, 420.

"Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations which govern actions at law."

Met. Nat. Bank v. Dispatch Co., 149 U. S., 436, 448.

"At law, fraud must be taken advantage of within six years of its discovery. Where, however, an equitable action must be brought, by analogy a court of equity will follow the period fixed in law cases by statute."

Du Pont v. Du Box, 29 S. E. (S. C.), 665, 668.

Upon the facts averred in the bill it must be held that the plaintiff's cause of action arose and time began to run against him from the date of the delivery of the Sheriff's deed, and that he is now barred by his laches.

Lee v. Hoover, 124 N. E. (Ind.), 783;
De Martin v. Phelan, 51 Fed., 865.

"Where an administrator purchased land sold under foreclosure sale in his own name and claimed title under a Sheriff's deed, a suit to set aside the deed to quiet the title, and for an accounting for rents was held barred by a delay of nine years."

Stianson v. Stianson, 167 N. W. (S. D.), 237, 241.

"The rights even of co-tenants may be lost under such circumstances."

Stevenson v. Boyd, 96 Pac. (Cal.), 284;
Savage v. Bradley, 43, So. (Ala.), 20;
Smith v. Mill Co., 13 Haw., 716.

In the case at bar, however, when the equity of redemption was purchased at the execution sale by Mrs. Lucas, the mortgage became merged in the fee and thereafter she was the sole owner of the entire title to Frank Bertelmann's one-ninth interest in the land.

"It is a general rule that when the legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession."

1 Jones on Mortgages, Sec. 848.

"When a mortgagee buys the mortgaged property at a sheriff's sale under a judgment he acquires an absolute title to the property."

Harrison v. Roberts, 6 Fla., 711.

We contend therefore that if the Petitioner ever did have a right to attack the Sheriff's deed on the ground of fraud or the inadequacy of consideration he has lost that right by sleeping on his rights for so many years.

As to the mortgage. The same line of reasoning applies to the mortgage. Even if the mortgage had not gone out of existence through being merged in the deed, the time to redeem it has long since passed. Just as the mortgagee's right to foreclose a mortgage may be barred by the period prescribed by the statute of limitations for the recovery of land, so will the right of the mortgagor to redeem a mortgage be lost by the like period.

The case of Hilo v. Liliuokalani, 15 Haw., 507, was a suit to restrain the foreclosure of mortgages. The court there said:

> "The remedy at law against the land, however, would be barred by the period applicable to real actions, and while, strictly speaking, the statute is not applicable to suits in equity, yet equity follows it by analogy. * * * To prevent foreclosure it was not necessary that the Plaintiff mortgagor should have given notice to the defendant mortgagee that she claimed adversely. Mere lapse of time, the mortgagor being in possession, and non-payment on account of interest or principal, in the absence of other recognition of the mortgagee's claims or rights, is sufficient to raise a presumption of payment after the lapse of the statutory period applicable to real actions."

See also, Kipuhulu S. Co. v. Nakila, 20 Haw., 621.

"Such also is the doctrine of the Supreme Court of the United States."

Piatt v. Bank, 9 Pet., 405, 415.

It has also been decided that a mortgagor cannot redeem the mortgage after the statutory period for the recovery of land has elapsed.

Slicer v. Bank of Pittsburgh, 16 How., 572, 580;

Batchelder v. Bickford, 104 Atl. (Me.), 819.

In Dixon v. Hayes, 55 So. (Ala.), 164, the court said:

"Where the mortgagee, after the law day of the mortgage, has been in possession of the subject for a period of 10 years, without an account for rents and profits, or other recognition of the equity of redemption remaining in the mortgagor, or in his privies, the right of the mortgagor, or of his privies, to redeem is finally barred."

In Lucas v. Skinner, 70 So. (Ala.), 88, it was held that after a lapse of less than 17 years, where the mortgagee had collected the rents under an agreement that he would not foreclose, the mortgagor's administratrix was denied the right to redeem and for an accounting on the ground of laches independently of the statute of limitations. That case seems to be directly in point.

The bill in this case shows that with respect to his claims as to the deed and the mortgage the Petitioner has delayed action beyond the period of the statute of limitations, and shows no legal ex-

cuse for the delay. Under such circumstances his laches must be held to be shown by his own averments.

> "Where, on the face of the bill, it appears that there has been an unreasonably long delay in instituting the suit so that apparently Plaintiff has been guilty of laches, the bill must by specific averment account for and excuse the delay."
>
> 21 Corp. Jur., 401;
> Richards v. Mackall, 124 U. S., 183;
> Hart v. Heidweyer, 152 U. S., 547, 558;
> Hendryx v. Perkins, 114 Fed., 801, 811;
> Dustin v. Brown, 130 N. E., 859, 864.
>
> "While courts of equity are not bound by, they ordinarily act or refuse to act in analogy to, the statutes of limitations relating to actions at law of like character. When a suit is brought after the time fixed by the analogous statute, the burden is on the complainant to plead and prove that it would be inequitable to apply it to his case, and when a suit is brought within the statutory time for the analogous action at law, the burden is on the defendant to show either from the face of the bill or by his answer that extraordinary circumstances exist, which require the immediate application of the doctrine of laches."
>
> Boynton v. Haggart, 120 Fed., 819, 830.

In the case at bar, as above pointed out, the laches appears on the face of the bill, and, as shown by the cases above referred to in this section of this brief, whether the statutory period of time is to be applied, or whether the facts shown by the bill be

considered strictly from the equitable standpoint of laches independently of the statute, the result will be the same.

Opposing counsel properly say in their brief that in equity there is no arbitrary time prescribed for the operation of the doctrine. The correct rule was clearly stated in Boynton v. Haggart, supra, and followed by the Circuit Court of Appeals for the Ninth Circuit in Smith v. Smith, 224 Fed., 1, 6, to the effect that when suit is brought after the time fixed by the statute of limitations the burden is upon the complainant to *plead and prove* that it would be inequitable to apply it to his case. The bill in this case contains no averment whatever to show that the statutory period should not be applied here.

The principle of the federal courts was recognized ~~by this court~~ in Hawaii in the case of Magoon v. Lord-Young Co., 22 Haw., 327, 350 (cited in Appellant's brief, p. 43) wherein it was held that where equitable relief is sought in support of a legal right "mere delay unaccompanied by circumstances constituting an estoppel will not defeat the remedy *unless it has continued so long as to defeat the right itself.*" In the case at bar the right itself has been defeated by the delay of more than the statutory period of ten years.

Counsel for the Appellant point out (brief, p. 42) that the mortgage contained a provision to the effect that until default the mortgagor, his heirs and

assigns, may hold and enjoy the premises, but the bill of complaint, all the way through, shows that the Defendants, Lucas and Scott, through their tenant the Kilauea Sugar Plantation Co. are in possession of the entire property.

In Paragraph 4 of the bill Petitioner claims to be "entitled to the possession" of the land. In Paragraph 14 the Plaintiff says that the Lucas' "are liable to Petitioner for the full value of the use and occupancy of said land which they have ever since said time *withheld from* Petitioner." In Paragraph 16 Petitioner says that the Kilauea Sugar Plantation Co. "have been in possession of said land, during all time since the same became the property of petitioner * * * and said Respondent have been enjoying the use of said lands." The agreement between Petitioner and McCandless et al recited that the object was that the Petitioner might "recover and be in possession" of the land. In Paragraph 18 it is alleged that Aluli and Lane agreed to prosecute Petitioner's rights and "get possession" of the land. In Paragraph 20 Petitioner alleges that McCandless et al neglected to take any steps to carry out their agreement "to put Petitioner in possession of his said lands." In Paragraph 21 Petitioner alleges that an action of ejectment was instituted against the Lucas' and Scotts "to recover the lands in controversy." In Paragraph 24 it is alleged that the Kilauea Sugar Plantation Co. "are occupying

and using said land under an agreement or lease of some kind with or from one or more of the Respondents, and they and said Respondents are making use of their possession," etc. In Paragraph 13, it is averred that Mrs. Lucas "is asserting title to said land against Petitioner" under the Sheriff's deed of February 7, 1903. And the Complainant prays for a decree "for the possession of his land."

It is worse than useless, therefore, for counsel to contend that the Appellant is in possession of one-ninth or any portion of the land, or that he is a tenant in common with the Lucas' and Scotts.

EIGHTH GROUND

Remedy at Law

"It is fundamental that equity will not take jurisdiction of a controversy where the plaintiff has an adequate remedy at law."

Hipp v. Babin, 19 How., 271;

Equitable Society v. Brown, 213 U. S., 25, 50;

Wehman v. Conklin, 155 U. S., 314, 323.

"Under the Seventh Amendment of the U. S. Constitution which is in force in this Territory (Bannister v. Lucas, 21 Haw., 222, 229) parties are entitled to a trial by jury in actions involving legal claims to land."

"And the statute of Hawaii (R. L. 1915, Sec. 2473) gives jurisdiction to the circuit judges in equity only when there is not a plain, adequate and complete remedy at the common law."

Makainai v. Lalakea, 24 Haw., 268, 272.

"Where the controversy involves merely the legal title to lands there is an adequate remedy

at law and the case is not one for the jurisdiction of a court of equity."

21 Corp. Jur., 62.

"The jurisdiction in respect to titles to real estate is in courts of common law."

Kaaimanu v. Kauwa, 3 Haw., 610, 612;

Kapuakela v. Iaea, 9 Haw., 555.

"Where the complainant in a bill in equity to recover real estate is out of possession, alleges that the defendants are in possession by force and fraud and prays for the removal of clouds upon his title, he cannot maintain his action on the plea of preventing a multiplicity of suits where the defendants can be joined in one action at law."

McGuire v. Pensacola Co., 105 Fed., 677.

The bill in this case shows on its face that the Lucas' and Scotts and the Kilauea Sugar Plantation Co. are in possession of the land in dispute, and that they can be and have, in fact, been joined as defendants in one action of ejectment. In an action at law to quiet title also those defendants could all be joined under the provisions of the statute (R. L. Hawaii, 1915, Chap. 153) which allows Plaintiffs whether in or out of possession to join as Defendants all other persons who claim interests in the land, and in such a proceeding the parties are accorded their constitutional right to a jury trial.

Kahoiwai v. Limaeu, 10 Haw., 507;
Mossman v. Dole, 14 Haw., 365, 369;
Lahaina Agl. Co. v. Poaha, 18 Haw., 494;
Paiko v. Boeynaems, 22 Haw., 223, 237.

We do not contend, as opposing counsel seem to think, that the giving to courts of law jurisdiction in actions to quiet title to land irrespective of who is in possession has taken from the courts of equity any jurisdiction possessed by them. Where, as here, the Petitioner is out of possession, equity would have no jurisdiction whether the statute had been enacted or not.

If, as alleged in the bill, the deed of the High Sheriff was void its nullity can be shown in an action at law as well as in a suit in equity.

> Palau v. Halemano Land Co., 22 Haw., 357; 361;
> Dee v. Foster, 21 Haw., 1.
> "An owner of land has a plain, adequate and complete remedy at law against one in possession claiming under a void deed."
> Whitehead v. Shattuck, 138 U. S., 146;
> Smyth v. Canal Co., 141 U. S., 656.

In Paragraph 13 of the bill the Petitioner avers that the sheriff's deed is void for several reasons, and that it constitutes a cloud upon his title. But, as above pointed out, a void deed passes no title and there is no need of equitable relief because the remedy at law against such a deed is plain, adequate and complete.

In Paragraph 14 of the bill the Petitioner avers that the mortgage on his one-ninth share in the land "has been more than satisfied by the moneys belonging to Petitioner" and the Complainant prays

that Mrs. Lucas be required to account for the balance due him. That being so, the lien has been satisfied, and there is nothing but the statute of limitations to prevent the Petitioner from obtaining relief at law so far as that mortgage is concerned. It is not true, as contended by opposing counsel, that an accounting for the rents received can be had in equity, because the recovery could as well be had in an action of ejectment.

> "It is well settled that the right of trial by jury secured by the Constitution cannot be impaired by joining with a claim cognizable at law a claim for equitable relief."
> Scott v. Neely, 140 U. S., 106;
> U. S. Mining Co. v. Lawson, 115 Fed., 1005;
> Bearden v. Benner, 120 Fed., 690;
> N. J. L. & L. Co., v. Lumber Co., 190 Fed., 861, 869.

The fact that Petitioner may have an equitable claim against McCandless and his associates does not authorize the Petitioner to sue the others in equity.

Counsel for Appellant cite a number of cases in support of the proposition that where jurisdiction has once been properly assumed a court of equity may retain jurisdiction even though in so doing it may decide questions not of equitable jurisdiction.

We do not dispute that as a general principle, but the question here is not what a court of equity may do *after* it has properly taken jurisdiction, but when can it *properly take* jurisdiction.

Counsel cite the case of Terminal Co. v. Hudnall, 283 Fed., 150 and Camp v. Boyd, 229 U. S., 530, in support of the proposition that where a purely equitable title is claimed, which is not available at law, equity will take jurisdiction and restrain the action at law.

We have already pointed out that the bill in the Hudnall case was sustainable because the complainants were in possession, and for the purpose of avoiding a multiplicity of suits, as several had been commenced and more were threatened. But what is more important, in this particular connection is that the titles claimed by the complainants in that case were equitable titles.

In Camp v. Boyd, the defendant had instituted against the complainant an action of ejectment for an entire lot which was made up of three pieces under three different titles. The complainant was in possession of the entire lot and had the legal as well as the equitable title to one of the pieces but only the equitable title to the other two. It is obvious that in the action of ejectment the Defendant (Complainant in equity) would have been defeated as to two of the pieces. The Complainant was entitled, of course, to go into equity as to those two pieces, and as to the piece to which he had the legal title, he was entitled to go into equity because he was in possession. He was entitled to have the action of ejectment restrained for the additional reason that it had been brought for the reocvery of the entire lot.

The two cases referred to, therefore, are easily distinguishable and are not in point.

Even if the Petitioner were obliged to go into equity with reference to the status of the deed and mortgage which relate to only a one-ninth interest, he could not drag into equity the controversy in regard to the legal title to the other eight-ninths.

> "It is quite true, as held by the learned judge below, that equity, having acquired jurisdiction of a case, may decide all matters incidentally connected with it, so as to make a final determination of the whole subject; but this rule does not extend to a case where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a distinct and appropriate legal remedy of its own."
>
> Graeff v. Felix, 49 Atl. (Pa.), 758.
>
> Legal remedies will be applied in equity only where they are incidental to some main subject of equitable jurisdiction and for the purpose of completing the relief.
>
> "A court of equity in this state can deal with legal questions only so far as their decision is incidental or essential to the determination of some equitable question."
>
> Stout v. Assur. Co., 56 Atl., (N. J.), 691, 694.
>
> "Counsel for Appellant has collated a multitude of cases in suppport of the proposition that when a court of equity once acquires jurisdiction it will go on and administer complete justice between the parties over the subject-matter in issue between them, will even adjudge damages and enforce payment. That is very true, but it only does so in support of and under and in furtherance of its chancery jurisdic-

tion, and to enforce an equitable right, and when the money demanded arises under such circumstances as bring it within the equity jurisdiction of the court. It cannot usurp the functions of a court of law."

Fowles v. Bentley, 115 S. W. (Mo.), 1090, 1097.

"As to the other averments which it is claimed confer jurisdiction in equity, it is only necessary to say that charges of fraud and conspiracy and prayers for injunction and the cancellation of deeds as a cloud on title do not confer jurisdiction in equity, when the bill, taken as a whole, shows that the remedy at law is complete and adequate. If it were otherwise, a defendant could be deprived, by a mere form of pleading, of the constitutional right to a trial by jury which he has in all suits at common law where the value in controversy shall exceed twenty dollars."

Marthinson v. King, 150 Fed., 48, 54.

As already pointed out, the joining of legal and equitable claims renders a bill multifarious.

Twenty-third St. R. Co. v. Ray Co., 177 Fed., 477;

Mesisco v. Guiliano, 190 Mass., 352;

Saltman v. Nesson, 201 Mass., 534, 539;

Polckzek v. Ins. Co., 91 Atl. (N. J.), 812.

FIRST GROUND

No Equity in the Bill

From what has been said we think it is entirely clear that as to Petitioner's claim against the Lucas' as to seven-ninths interest in the land it is purely and simply legal in nature, and as to which the Petitioner has a plain, adequate and complete rem-

edy at law and the defendants are entitled to a trial by jury. We also believe that as to the other one ninth interest which was the subject of the mortgage and the sheriff's deed, the mortgage alleged to have been satisfied, and the deed alleged to be void, the complainant likewise has a plain, adequate and complete remedey at law either in ejectment or a statutory action to quiet title. But even if the Petitioner's remedy as to the one-ninth is in equity that cannot be allowed to drag the litigation as to the seven-ninths into equity also. The tail cannot wag the dog. Neither can the fact that the petitioner has equitable claims against McCandless et al be used to deprive the Lucas' and Scotts of their constitutional right to trial by jury.

If the sheriff's deed was merely voidable the Complainant has lost his equitable remedy to have it set aside by his laches. And, as to the mortgage, as heretofore shown, his right to redeem has also been lost by laches. So that there is nothing to litigate as between the Lucas' and Petitioners but the legal controversy with reference to the remaining seven-ninths interest in the land.

So far as Appellant's controversy with McCandless and his associates is concerned the Lucas' are not interested.

It is indisputable that the controversy between the Petitioner and the Lucas' as to the seven-ninths

involves a plain dispute over the legal title arising under the will of Christian Bertelmann. And the bill shows that even as to those seven-ninths the Petitioner has failed to obtain them because he had previously lost his right to acquire his brothers' and sisters' interests by reason of his having lost his own one-ninth through the execution sale. Christian Bertelmann said in his will, "It is my sincere wish and *will* that my lands shall befall in equal shares and interest upon my three sons." Frank Bertelmann, by his improvidence, had lost his original interest and thus defeated his father's intention. The testator did not intend that a defaulting son should take from his brothers and sisters their shares in the land at a figure far below their actual values for the benefit, not of himself, but for the profit of McCandless, Aluli and Lane. In other words, when the Petitioner let his own interest in the land slip through his fingers he became a "short-coming" son within the meaning of the will.

Furthermore, as pointed out by the Supreme Court in Scott v. Lucas, 23 Haw., 338, 342 and by the Court of Appeals in 239 Fed., 450, 457, the interests in the land given to the brothers and sisters were vested estates subject to be defeated by the performance of a condition. That condition was to be performed by the payment of any son who was not "short-coming" of the sum of $5000 to each of the "surviving daughters" and "short-coming son or sons" personally, and not to their assigns. A

condition subsequent, such as this must, of course, be performed *strictly.* The tenders alleged to have been made to the Lucas', therefore, were made to the wrong persons and did not have the effect of transferring the title to the Petitioner.

By the third article of the will of Christian Bertel mann any son who was not "short-coming" could acquire the interests of the daughters and "short-coming" sons by paying them $5000 each. The right to acquire such interests was, by the terms of the will, a personal right. By the fourth article of the will it was provided that if the land should be sold or leased again the money derived from such sale or lease "will be equally divided amongst my children *or their lawful heirs and assigns.*" But in the third article the testator provided that in order to defeat the estates of the daughters and short-coming sons there should be paid the sum of $5000 "to each of my daughters or surviving daughters" and "to my short-coming son or sons." The testator did not say "to each of my daughters and short-coming sons, *or their heirs or assigns,*" and the difference in phraseology is very significant. If the testator had not cared whether the sons would have the land he would not have made the provision as he did. He certainly did not wish his daughters' estates to be defeated by land speculators or contingent fee lawyers.

The bill of complaint, on its face, shows that the Petitioner was not trying to acquire his brothers' and sisters' interests for himself in order to carry out the wish of his father. He had lost his own interest through his improvidence, and the scheme in making the alleged tenders was for the purpose of acquiring the land for the benefit of strangers to the family. Being in default, and unable to carry out his father's desire, the Petitioner was a "short-coming" son within the meaning of the will, and the will gave no right to such a son to acquire any interest from any of the daughters.

The word "short-coming" is defined in the Standard Dictionary as "A failure of full performance; remissness in duty; delinquency"; and in Webster's as of "Neglect of, or failure in, performance of duty."

Industry and thrift on the part of the sons was what the testator had in mind. The bill shows that the Petitioner failed of full performance of what his father declared to be his "wish and will"; that he was remiss in duty, neglectful and delinquent.

The testator's intention clearly was that the payments of $5000 should be made by the son or sons personally to the daughters and short-coming sons personally. Only in that way could a son who was not short-coming comply with the condition prescribed by the testator.

Nothing that Mrs. Lucas might have said or done, nothing that the Petitioner or his counsel might wish, could alter the terms prescribed by the testator in his will, and upon the observance of which only, could the estates of the daughters and short-coming sons be defeated.

Each child having been given a vested estate in one-ninth of the land any son or daughter could sell and convey his or her ninth interest, but the purchaser would take it subject to the right of any son who was not "short-coming" to defeat the estate by paying the vendor, within the prescribed time, the sum of $5000. What should be done with the money after it was paid would be a matter of agreement entirely between the vendor and purchaser. The son who paid the money would not have to worry about that. It would be none of his business.

> "The circumstance of an estate being subject to a condition does not affect its capacity of being aliened, devised, or descending, in the same manner as an indefeasible one, the purchaser or whoever takes the estate by devise or descent taking it subject to whatever condition is annexed to it."
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> 2 Washb. R. P. (4th Ed.), p. 23.
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> "The owner of a determinable fee in real estate has all the right of an owner in fee simple in regard to the use or disposal of the real estate. * * * and if he should sell, his purchaser would also take a determinable fee."
>
> Hillis v. Dils, 100 N. E. (Ind.), 1047, 1049.

The rights and liabilities of the testator's sons and daughters were not created by any agreement among themselves, but were defined and limited by the terms of the will which, of course, cannot be changed.

This phase of the case really settles the whole controversy and shows that there is no equity in the bill.

On Page 58 of their brief counsel for Appellant point out that the mortgagor covenanted "not to suffer or do any act or negligence" whereby the premises shall become liable to attachment or whereby the security shall become impaired, and that in the event of foreclosure the mortgagee could retain "all advances and expenditures made necessary by any default of the mortgagor." The covenant referred to was the covenant of the mortgagor, not that of the mortgagee, and it imposed no duty or obligation on the mortgagee.

> "The relation between them (mortgagor and mortgagee) is not so far analogous to that between trustee and cestui que trust as to preclude the mortgagee's purchasing. The real reason why a person standing in the relation of trustee cannot purchase from his cestui que trust is, that he cannot purchase that which he has to sell. He has a duty to perform as a trustee, in selling for the best advantage of his beneficiary; and this is inconsistent with his personal interest to obtain the property on terms advantageous to himself. But there is

no trust relation between the mortgagor and the mortgagee. The mortgagee is under no obligation to protect the equity of redemption. * * * In the absence of fraud, undue influence, or confidential relations, the mortgagee may purchase the equity of redemption of the mortgagor, upon the same footing that any other person may purchase it. * * * The general rule, therefore, is that the mortgagee may acquire the equity of redemption either directly from the owner, or at a sale by his assignee in bankruptcy, *or by his ceditor upon execution.* He may acquire any title adverse to the mortgagor, whatever it may be, and set it up against his claim to redeem."

1 Jones on Mortgages (6th Ed.), Sec. 711;
Blythe v. Richards, 10 S. & R., 261;
Harrison v. Roberts, 6 Fla., 714;
Francis v. Sheats, 45 So. (Ala.), 241.

"The fact that the mortgagee is in possession does not change the rule. By taking possession he does not become a trustee except in a limited sense."

Grifin v. Marine Co., 52 Ill., 130, 144.

The contention is made that Mrs. Lucas and the Petitioner were tenants in common. Such, we submit, was not the case. Neither were the Bertelmann children "tenants in common by descent." Mrs. Lucas owns eight-ninths of the land and the Scotts own the other one-ninth. Furthermore, there is no trust relation between tenants in common, and it is well settled that one may acquire title by adverse possession against the other.

Nahinai v. Lai, 3 Haw., 317;
Smith v. Hamakua Mill Co., 13 Haw., 716;
Aiona v. Coffee Co., 20 Haw., 724.

The purchase through the sheriff's deed, in which the mortgage merged, was an ouster of the Petitioner, and the possession thereunder of Mrs. Lucas has always been adverse to the Petitioner whether the deed was void or voidable.

The Appellant (brief, p. 125) relies on the case of Sharon v. Tucker, 144 U. S., 533. But that case, as an examination of it will show, bears no resemblance to the case at bar. There, it appears, neither party had actual possession of the land. The Complainants had acquired title by adverse possession but had no evidence of that. The Respondents had the paper title but recognized the title claimed by the Complainants. The court took particular pains to point that out, saying:

"There is no controversy such as here stated in the present case. The title of the Complainant is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind."

And further on, the court said:

"There is no controversy here as to the title of the complainants."

And again, the court said:

"As the complainants have the legal title to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem

to be any just reason why the relief prayed for should not be granted."

If, in that case, the Defendants had been in posession and disputed the title of the Complainants the bill would have been dismissed because the Complainants would have had an adequate remedy in an action of ejectment.

Again, if it had appeared in that case, that the Complainants, or their predecessors in interest, had established their title by adverse possession by a judgment of a court of law the bill would have been dismissed because that judgment would have been evidence of title.

In the case at bar, unlike Sharon v. Tucker, the title is in dispute. In this case, unlike that case, the Respondents are in possession of the land and the Complainant is out of possession. The Complainant's remedy, if his claim of title is good, is by an action of ejectment in which the Respondents will be accorded their constitutional right to a trial by jury.

Sharon v. Tucker is not inconsistent with other cases decided by the Supreme Court in which it has been uniformly held that where the claimant of land is out of possession he has an adequate remedy at law against the party who is in possession.

If the Complainant in the case at bar has a good title to the land in question he can prevail in an action of ejectment against the Lucas,' the Scotts and

the Kilauea Sugar Plantation Company and the judgment in that case would be his evidence of title. He would not need to resort to a court of equity as did the Complainant in Sharon v. Tucker under the peculiar circumstances of that case.

We contend that the demurrers of these Respondents should be sustained on each and all the grounds therein stated, and that the decree appealed from should be affirmed.

Respectfully submitted,

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